The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society

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I. INTRODUCTION

In 1954 the Supreme Court declared that racially separate education was inherently unequal.[1] It thus abandoned the separate but equal doctrine[2] and ordered the elimination of segregated school systems "with all deliberate speed."[3] Local school officials and lower federal courts, toward whom the Court turned for effectuation of the desegregation mandate,[4] responded instead with deliberate evasion and resistance.[5] Faced with such recalcitrance, the Court during the 1960s consistently rejected plans that disguised delay tactics and tokenism.[6] After more than a decade of delay and strategies designed to preserve the status quo rather than actually dismantle dual school systems,[7] the Court announced that "[t]he time for mere 'deliberate speed' ha[d] run out."[8] It consequently demanded plans that "promis[e] realistically to work *now*."[9]

The Court's language, although forceful, proved to be far from encompassing. During the 1970s, the Court articulated three major limiting principles that delineated

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1. Brown v. Board of Education, 347 U.S. 483, 495 (1954) (*Brown I*).

2. The Court "conclude[d] that in the field of public education the doctrine of separate but equal has no place." *Id.* The decision became the basis not only for desegregation of schools, but also for other public facilities. *See* G. GUNTHER, CONSTITUTIONAL LAW 639 & n.1 (1985).

3. Brown v. Board of Education, 349 U.S. 294, 301 (1955) (*Brown II*).

4. Noting the "varied [nature of] local school problems[,]" the Court assigned primary responsibility for assessing and solving them to school officials. *Id.* at 299. Given a need to determine whether constitutional principles were implemented in good faith, the Court decided to have judges closest to local conditions evaluate compliance. *See id.*

5. Rather than insisting upon an immediate cessation of an unconstitutional condition, the Court anticipated complexities in the transition from dual to desegregated systems. *See id.* By vesting local school officials and federal district courts with primary responsibility to conform the desegregation mandate to local contexts, the Court tried to defuse a politically explosive issue. Its reliance was misplaced, however, as massive resistance proved to be the primary consequence. One of the school systems which the Court declared unconstitutional in *Brown I* remained segregated at least a decade later. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 862 (5th Cir. 1966), *corrected*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967). The lead case in *Brown I*, moreover, was reopened pursuant to the claim that desegregation still had not been effectuated. *See* Brown v. Board of Education, No. T-316 (D. Kan. Apr. 9, 1987). The district court's finding, however, was to the contrary. *See id.*

6. *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. Prince Edward County Bd. of Educ., 377 U.S. 218 (1964); Goss v. Board of Education, 373 U.S. 683 (1963).

7. Freedom of choice, pupil placement, and student transfer plans, purportedly constructed as remedies, actually perpetuated rather than eliminated segregation. *See* Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 203–12 (1964).

8. Griffin v. Prince Edward County Bd. of Educ., 377 U.S. 218, 234 (1964).

9. Green v. County School Bd., 391 U.S. 430, 439 (1968) (emphasis in original). Consistent with that principle, the Court denied a request for a semester's delay in implementing a desegregation plan. Despite arguments that the delay was sought only to avoid mid-term disruption, the Court asserted that "the obligation of every school district is to terminate dual systems at once and to operate now and hereafter only unitary schools." Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam).

significant perimeters around the duty to desegregate. The obligation to eliminate racially identifiable schools was reaffirmed for instances in which the segregation had been state enforced.[10] To the extent segregation could be characterized as de facto and thus not tied to official action, however, no obligation to desegregate was found to exist.[11] Interdistrict remedies, moreover, were not required absent proof that discriminatory action from outside a district contributed substantially to segregated conditions within it.[12] Finally, the Court decided that the duty to desegregate would not endure beyond a finding that a school system had become unitary.[13] Once a dual system was dismantled, no obligation remained to preserve the fruits of constitutionally mandated desegregation.[14] As discussed later,[15] the desegregation boundaries identified by the Court during the 1970s have proved troublesome and leave untouched the consequences of racial aversion attributable to cultural conditioning rather than official mandate.

Central to *Brown v. Board of Education*[16] was the objective of abolishing racially identifiable schools because racial separation represented an official stamp of inferiority and had an adverse effect upon the psychological well-being and educational opportunities of its victims.[17] Without belittling the significance of *Brown* one must recognize what the Court then and later did not address or accomplish. To the extent equal protection doctrine has not been calibrated to respond to pertinent social dynamics or underlying sources of racial aversion, segregation has merely been forced to alter its visage.

The desegregation mandate was formulated at approximately the time when unprecedented personal mobility and suburban development coalesced to expand and redefine metropolitan areas. By the 1970s, new school districts were emerging in suburbs that had only recently developed. Insofar as their newness militated against finding a record of discrimination, they were largely immunized from the desegregation mandate.[18] As equal protection reasoning became increasingly mired in narrowly defined concepts of official and purposeful action [19] and strayed further

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10. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 737 (1974).

11. "[P]urpose or intent to segregate [is] . . . the differentiating factor between *de jure* and so-called *de facto* segregation." Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

12. The Court concluded that the right to attend a unitary school was not denied "[u]nless petitioners drew the district lines in a discriminatory fashion, or arranged for white [and black] students . . . to attend [separate] schools." Milliken v. Bradley, 418 U.S. 717, 746–47 (1974).

13. "[H]aving once implemented a racially neutral attendance pattern in order to remedy . . . perceived constitutional violations, . . . no duty exists to prevent or correct resegregation unless it is the product of official discriminatory purpose." Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436–37 (1976). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971).

14. *See id.*

15. *See infra* notes 54–91 and accompanying text.

16. 347 U.S. 483 (1954).

17. *Id.* at 494. The Court relied heavily upon social scientists' findings to the effect that separation on the basis of race generates an enduring sense of inferiority that, among other things, retards educational development. The harm of stigmatizing action is two-fold: it injures psychologically "by assaulting a person's self-respect and human dignity, and [by] brand[ing] . . . with a sign that designates inferior status to others . . . ." Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350–51 (1987).

18. *See infra* notes 60–66 and accompanying text.

19. *See infra* notes 49–59 and accompanying text.

from the flexibility characteristic of *Brown*,[20] it became increasingly apparent that equal protection doctrine would focus upon the most overt symptoms but not the underlying causes of segregation. The Court in *Brown* eliminated a long-standing methodology that was the consequence of racial aversion. Although official segregation was declared legally wrong, however, the irrational majoritarian perceptions and cultural conditioning responsible for it survived. Other means for maintaining racial separation could thus survive or replace old ones. Having only scratched the surface and not having focused upon underlying cause, the Court in the 1970s could naively assert that white flight immediately following a desegregation order merely represented a "normal pattern of human migration."[21]

Given the Court's insistence during the 1950s and 1960s upon genuine rather than pretended equal educational opportunity, but failure during the 1970s to recalibrate the desegregation mandate in response to substantial revisions of the social milieu or variant manifestations of racial aversion, a central question for the 1980s and beyond is how to consolidate, preserve, and enhance equal protection accomplishments. To the extent that a system was officially segregated in the past, but has since been declared unitary, official efforts to perpetuate racial balance are not constitutionally obligatory.[22] Whether pursuant to state law or otherwise,[23] integration effectuation, and maintenance policies have nonetheless evolved but, to the extent that they evince majoritarian sensitivity, they have evoked growing constitutional attention.[24]

Such concepts are part of a circular process because they respond to demographic changes that in turn may be engendered by race-based anxiety or aversion. Racially homogeneous suburbs have been effectively immune from desegregation principles creating, at least for now, largely impenetrable barriers to enduring integration. With a shrinking base of white students available for facilitating desegregation objectives, new policies have emerged purportedly to discourage the exodus of white students from city schools.[25] Such plans reflect a sense that equal protection goals are not well-served if existing distance, anxiety, or fear are exacerbated.[26] However, they also evince increased sensitivity to majoritarian

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20. Flexibility in effectuating equal protection aims was evinced by the very embrace of the desegregation principle. Despite acknowledging efforts to equalize "tangibles" such as buildings, curricula, and teacher qualifications and salaries, for instance, the Court became convinced that the separate but equal doctrine could not guarantee genuinely equal educational opportunity. *See* Brown v. Board of Education, 347 U.S. 483, 492 (1954). The formula was abandoned because it was perceived to be incapable of effectuating equal protection objectives under any circumstances. *See id.* The desegregation mandate thus was not ordained to become stale but rather, consistent with the spirit of *Brown*, amenable to adjustments necessary to make it responsive to changing circumstances.

21. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976).

22. *See id.* at 436–37; Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971).

23. For instance, it is a matter of New York "State educational policy to promote integration." Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 711 (2d Cir. 1979).

24. *See, e.g.*, Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986); Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574 (2d Cir. 1984).

25. Curtailment of busing and reintroduction of neighborhood schools have reflected official concern that too many white students would otherwise leave city schools. *See* Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). Controls upon increases in minority enrollments at certain schools have been set pursuant to similar concerns regarding white flight. *See* Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574 (2d Cir. 1984).

26. Remedies such as mandatory cross-town busing, which may have been essential for dismantling dual school

instincts[27] and impose significant burdens upon the victims of segregation.[28] The consequences suggest not only that the effect of the desegregation doctrine, for all the trauma associated with it, has been less than pervasive and enduring; they also point to a need for more forthright and sensitive appraisal of the nature and sources of equal protection harm, to escape the straitjacket of the discriminatory intent standard and other limiting principles introduced in the 1970s, and perhaps to focus less upon what motivates official action and more upon what meaning society attaches to such action.[29]

Despite an opportunity to focus upon those concerns this term in *Riddick v. School Board of City of Norfolk*,[30] and intimations that it would do so,[31] the Court eventually refrained from confronting them. Its disinclination to consider the case, however, almost certainly represents deferred rather than denied review[32] of issues that its restrictive contouring of the desegregation mandate has helped eventuate. This article will (1) trace the evolution of the desegregation mandate and its limiting principles which have made much segregation constitutionally untouchable and resegregation constitutionally resistant; (2) examine the majoritarian-sensitive policies which are evolving pursuant to the curtailed desegregation mandate; and (3) consider appropriate judicial responses to the vexing equal protection questions they engender and post-desegregation alternatives for equal educational opportunity.

II. The Evolution and Evisceration of the Desegregation Mandate

Adverse reaction to the desegregation decree, as originally formulated, was swift and visceral and has been well-documented.[33] The Court, deferring to the idiosyncrasies of diverse communities, needing grass-roots cooperation, and proba-

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systems, may be discontinued once a unitary system is effectuated and have been abandoned in the name of integration maintenance. *See* Riddick v. School Bd. of Norfolk, 784 F.2d 521, 540 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

27. Courts, for instance, seem increasingly disposed to distinguish what they characterize as "the defense of white flight as a smokescreen to avoid integration and realistically considering and dealing with the practical problems involved in making voluntary efforts to achieve integration." *Id.* at 539; Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 720 (1979) (quoting Higgins v. Board of Educ. of Grand Rapids, 508 F.2d 779, 794 (6th Cir. 1974)). The emergence during the 1970s of more majoritarian-sensitive analysis by the Court is discussed *infra* notes 65–84 and accompanying text.

28. Funding, for instance, may be significantly less for minority schools compared to other schools within the same district. *See* The Christian Science Monitor, Nov. 20, 1986, at 29–30, col. 1. Allocation of human resources, moreover, may be a function of views by teachers and principals that inner-city schools are undesirable places to work. *Id.*

29. Racially segregated schools, for instance, have been officially contemplated and countenanced albeit purportedly to stablize city-wide racial balance in public schools. *See, e.g.*, Riddick v. School Bd. of Norfolk, 784 F.2d 521, 527 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986); Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574, 576 (2d Cir. 1984).

30. *See* 107 S. Ct. 420 (1986).

31. An application to the Court for an injunction against the plan was denied. *See* 106 S. Ct. 2913 (1986). Justices Marshall and Blackmun would have granted the application, and Justice Stevens would have expedited consideration of the petition for a writ of certiorari. *See id.* Eventually, the Court denied certiorari, although Justice White would have granted it. *See* 107 S. Ct. 420 (1986).

32. Despite expectations to the contrary, the Court avoided the issue this term. *See Busing: The Next Phase*, Newsweek, Nov. 17, 1986, at 60. Because so many other school districts are in comparable circumstances, however, review may be inevitable. *See id.*

33. The response to the desegregation mandate is discussed in II N. Dorsen, P. Bender, B. Neuborne & S. Law, Political And Civil Rights In The United States, Ch. XXVIII, 625.43 (1976); A. Lewis, Portrait Of A Decade 29–59, 102–06, 134–51, 251–58 (1965).

bly wanting to minimize the divisive potential of its decision,[34] originally relied upon local officials and courts to implement its mandate. The assignees of that responsibility, however, colluded to breach the Court's trust by ignoring the decree altogether,[35] devising plans that were ruses,[36] or employing delaying tactics.[37] Some states adopted a confrontational posture pursuant to state sovereignty principles[38] and enacted punitive measures encouraging official harassment of civil rights attorneys.[39] Resistance to desegregation was so strong and compliance so slight that, fifteen years after the *Brown* decision, delaying tactics and ineffective and insincere efforts continued to be commonplace responses to the Court's mandate.[40] Where opposition to unitary schools was especially deep-seated, evasive strategies have continued to breed, and desegregation even now has become only a partial reality.[41] As the focus upon segregated schools moved northward and westward, the Court probably experienced a sense of frustration and constraint upon its power.[42] Having fought annually the intransigence of one region where segregation was especially overt, and mandated change was grudgingly slow and incremental, experience may have created a reluctance to take the desegregation principle a major geographic step further.

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34. Given the radical overhaul of constitutional doctrine and effect upon law and custom, the Court must have known public response would be "electric and widely divergent." A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 207–08 (Rev. ed. 1968). To minimze adverse reaction, the Court limited its holding to the field of education. *See* Brown v. Board of Education, 347 U.S. 483, 495 (1954); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 576 (1985). It also sought cooperation from local officials by relying upon them to desegregate "with all deliberate speed" rather than overnight. Brown v. Board of Education, 347 U.S. 294, 301 (1955).

Even if the open-ended time table for desegregation was politically calculated, the theory has been advanced that the decision also was unconsciously racist. The notion, that time might be necessary to convert from a system of official discrimination (*see id.* at 299–301), may have reflected the sense that whites should not have to attend integrated schools until sufficient steps were taken to ensure their quality. *See* Wasserstrom, *Racism, Sexism, Approach to the Topics*, 24 U.C.L.A. L.REV. 581, 600 (1977).

35. Inaction was a viable option because litigation generally was necessary to change the status quo. Congress eventually tried to discourage delay by authorizing the Justice Department to initiate desegregation suits and denying federal funds to segregated systems. *See* N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, *supra* note 33, at 633–43.

36. Policies styled as desegregation plans actually were calculated to perpetuate segregation. Popular sham devices included freedom of choice and transfer plans permitting students to move from schools where they were in a minority to ones where they would be in a majority. *See* Green v. County School Bd., 391 U.S. 430, 439–42 (1968); Goss v. Board of Education, 373 U.S. 683, 686–88 (1963). Even after the Court's demand for immediate, effective remedies, district lines were gerrymandered to blunt the desegregation mandate. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1036 (1978).

37. Some federal district courts, for instance, refused to hear a desegregation suit until administrative remedies had been exhausted. *See* McNeese v. Board of Education, 373 U.S. 668 (1963). The Court rejected such a prerequisite to a hearing. *Id.* at 676. Nonetheless, the sympathies of the lower courts facilitated official stalling and bad faith. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 863 (5th Cir. 1966), *corrected*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

38. Arkansas, for instance, unsuccessfully attempted to condition the desegregation order upon legislative approval of it. *See* Cooper v. Aaron, 358 U.S. 1, 8–9 (1958).

39. A Virginia regulation, which would have disbarred attorneys representing groups with no monetary interest in the pertinent litigation, was invalidated pursuant to the first amendment. *See* NAACP v. Button, 371 U.S. 415 (1963).

40. *See* Green v. County School Bd., 391 U.S. 430, 438–39 (1968).

41. Some Southern school boards, for instance, have minimized taxes and underfunded public school systems to make private academies more affordable and racial separation more feasible. *See* The Christian Science Monitor, Oct. 4, 1986, at 1, col. 1.

42. A decade after the court ordered desegregation, only two percent of black students in the South attended schools where they were not in the majority. *See* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 124 (1974). The lack of results was the consequence of deliberate delay and evasion. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 863 (5th Cir. 1966), *corrected*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

The Court's original insistence upon the elimination of racially identifiable schools[43] followed logically its discrediting of the separate but equal doctrine. Tangible factors, such as facilities, curricula, and teacher qualifications and salaries, could have been equalized but generally were not.[44] The Court, however, concluded that intangible disparities could not be overcome pursuant to the separate but equal concept.[45] Although the Court recognized public education as an important tool for self-realization and effectuation of equal opportunity,[46] its findings responded to the least subtle variation of segregated public education. Legislated separatism may have been the most identifiable, but it was not the exclusive, cause of segregation. Forces operating independently or in combination with government-induced demographic patterns fostered other strains of institutionalized segregation.

Economic growth and related job opportunities from the 1920s onward attracted increasingly large numbers of blacks into northern and western cities.[47] As the most egregiously unequal forms of school segregation were being constitutionally challenged pursuant to a strategy calculated to undermine separatism on a measured and evolutionary basis,[48] more subtle but equally pernicious varieties were becoming entrenched not by legislative act but by official action or with official complicity. Government action or policies directly fostered racially discrete neighborhoods and effectively created community barriers that could not be crossed. Restrictive covenants, for instance, were legally enforceable until 1948.[49] Although finally declared unconstitutional, they, accompanied by government-mandated red-lining practices,[50] have had lasting consequences in defining housing patterns.[51] Residential segregation has been exacerbated by official decisions concerning the location of

43. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); Green v. County School Bd., 391 U.S. 430, 435 (1968).

44. In 1954 when *Brown I* was decided, the average expenditures in southern states for white and black students were $165 and $115 respectively. *See* A. Lewis, *supra* note 33, at 20.

45. *See* Brown v. Board of Education, 347 U.S. 483, 493–94 (1954). The Court had referred to intangible considerations, or "qualities which are incapable of objective measurement," in finding that a segregated law school and graduate school could not provide equal educational opportunities. *See* McLaurin v. Oklahoma State Reg., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950). It concluded that "[s]uch considerations apply with added force to children in grade and high schools." Brown v. Board of Education, 347 U.S. 483, 494 (1954).

46. The Court characterized education as "perhaps the most important functon of state and local governments . . . [essential to] the performance of our most basic public responsibilites . . . , the very foundation of good citizenship . . . [and the key to success] in life." Brown v. Board of Education, 347 U.S. 483, 493 (1954) (*Brown I*). It thus denominated education as "a right which must be available to all on equal terms." *Id.* That apparent guarantee was substantially diluted, however, by the Court's later determination that education was not a fundamental right and that disparities in educational funding and quality were tolerable. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 34–37 (1973).

47. *See* United States Bureau of the Census, Reflections of America: Commemorating The Statistical Abstract Centennial 136–37, Tables I & II (1980).

48. *See* K. Ripple, Constitutional Litigation §§ 4.2–4.3 (1984). The first part of the strategy was to insist upon total equalization of curricula, physical facilities, and faculty "on the theory that the extreme cost of maintaining two 'equal' school systems would eventually destroy segregation." Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integregation in Education Through Resort to the Courts*, 21 J. Negro Educ. 316, 318 (1952).

49. The Court determined that enforcement of a restrictive covenant would constitute state action and thus a violation of the fourteenth amendment. Shelley v. Kraemer, 334 U.S. 1 (1948).

50. The Federal Housing Administration formulated policies to protect residential loans from "adverse influences" upon underlying property. *See* P. Jacobs, Prelude To Riot: A View of Urban America From The Bottom 139–41 (1967). Such influences included the presence of "racially inharmonious groups." *Id.* Thus, the federal government played an active role in institutionalizing residential segregation. *See* G. Myrdal, An American Dilemma 625 (1962).

51. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 216 (1973) (Douglas, J., concurring).

public housing and schools and distribution of urban development funds.[52] In addition, actual or threatened violence, often aided or abetted by official action or posture, has further assured racially identifiable neighborhoods.[53]

The Court eventually characterized residential segregation as de facto,[54] and thus constitutionally tolerable. It is difficult, however, to see how the line of responsibility between official intent and consequence has ever been broken. Assertions that it is simplistic to attribute demographic changes to racist attitudes[55] themselves reflect naivete, if not a repressed sense of reality. No satisfactory alternative explanation has been advanced for persistently static demographic patterns in a highly mobile society or the resettlement process invariably triggered by a desegregation order.[56] Segregation in the North may have presented a different face, but it was no less official.[57] Unlike in the South, where legislation and custom required separation, "institutional segregation in the North" depended upon residential separation.[58] Because the northern strain added geographical distance and isolation to separation, it perhaps created an even less tractable problem than in the South where a symbiotic economic relationship evolved making distance more "ceremonial" than spatial.[59]

Separation fostered by official practices and policies was exacerbated by two forces that, although racially neutral, have altered the social matrix to the extent that what could have been a sweeping constitutional mandate now may be read very narrowly. Enhanced personal mobility and suburban development provided opportunities, in the post-*Brown* period, to resettle in newly created communities and

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52. *See id.*; Karst, *Not One Law at Rome and Another at Athens: The Fourteenth Amendment in Nationwide Application*, 1972 WASH. U.L.Q. 383, 388–89.

53. *See, e.g.*, W. TUTTLE, JR., RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919 157–83 (1970); S. DRAKE & H. CAYTON, BLACK METROPOLIS 174–82 (1945). The Court thus made segregation, descending directly from racial separation that was mandated and perpetuated by force of law or specter of violence, constitutionally acceptable. State action and offical purpose concepts are thus sterile legalisms as they would operate not in response to the wholesale intimidations by a community but only the acts of its elected agents.

Gender-based harassment by public employees creates working conditions that deny equal protection even absent traditional proof of direct purposeful official discrimination. *See* Bohen v. City of East Chicago, Indiana, 799 F.2d 1180, 1185–87 (7th Cir. 1986); *cf.* Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986). Segregated housing patterns resulting from abusive community and societal pressures should be regarded no differently for equal protection purposes. Consistent with the notion that racial classifications are subject to the strictest scrutiny and least countenanced by the equal protection clause, the argument for a constitutional violation is even stronger in the racial harassment context than in the gender harassment one.

54. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436–37 (1976). *See generally* Keyes v. School Dist. No. 1, 413 U.S. 189, 205–08 (1973).

55. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 485 (1979) (Powell, J., dissenting). The decision of whites to flee from an influx of blacks seems more akin to the sentiments inclining downtown merchants to use buzzer lock systems on their doors during hours of operation. Such a system enables proprietors to deny access to all blacks pursuant to fears that they are generally inclined toward criminal activity. *See*, The Washington Post, Sept. 7, 1986 (Magazine), at 34. For an examination of the racist perceptions and thought patterns underlying that and similar behavior, see Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

56. The argument, for instance, that residential segregation is attributable to income differences is undercut by the economic heterogeneity of most neighborhoods. "If people were residentially distributed according to the value of the housing they can afford, instead of according to skin color, levels of residential segregation would be low." Farley, *Residential Segregation and its Implications for School Integration*, LAW & CONTEMP. PROBS. 164, 174–75 (Winter 1975).

57. *See* G. MYRDAL, AN AMERICAN DILEMMA 618 (1944).

58. *See id.*

59. *See id.* at 621.

attend newly built schools.[60] Families that could afford moving to suburbia often did so with government assistance.[61] Left behind was a shrinking tax base, consequently deteriorating conditions, and a growing incentive for others to flee when the means became available to do so.[62] Because wealth lines generally tracked racial lines, and the broader equalization consequences which the *Brown* Court contemplated[63] had such little time in which to unfold, equal protection goals in part were subverted by a movement toward better funded, largely white suburban schools and underfunded, largely black city schools.[64]

Despite the ties between racial separation and official action that transcended regional boundaries, the Court during the 1970s largely exempted the North and West from the equal protection decree pursuant to the notion of de facto segregation.[65] What were presented as constitutional lines of distinction actually may have been embraced as boundaries of convenience reflecting the Court's sense that it could not compel extensive desegregation in a society disposed toward functional if not official segregation.[66]

The de facto principle essentially operates as a liability limiting concept conditioning equal protection remedies upon the showing that segregation is the proximate result of purposeful official action.[67] Because identification of a termination point for official responsibility necessitates a subjective reading of cause and effect, the formula invites criticism of its potential for constitutional treachery. Given widespread, recent, and manifest official contributions toward segregation in the North and West, the Court's introduction of the de facto principle might be characterized less as a hard decision recognizing shadings of cause and effect than as a procrustean inclination to disregard cause and effect altogether. Following more

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60. UNITED STATES BUREAU OF THE CENSUS, REFLECTIONS OF AMERICA: COMMEMORATING THE STATISTICAL ABSTRACT CENTENNIAL, 136–37 & Tables I and II (1980).

61. *See supra* note 50.

62. Such resettlement typifies "white flight," a process by which "wealthier whites . . . immunize . . . themselves from desegregation remedies that less wealthy groups have been unable to avoid." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1042 (1978).

63. The Court, concluding that the separate but equal doctrine would not produce equalization, assumed that a racially integrated setting would afford equal educational opportunities. *See* Brown v. Board of Education, 347 U.S. 483, 493–95 (1954). Fixed attitudes, however, may deny such opportunities even in an integrated context. *See infra* note 175 and accompanying text.

64. In two of Ohio's largest cities—Cincinnati and Columbus—for instance, average per student expenditures amount to $3,000 contrasted with $4,000 in nearby suburbs. *See* STATE OF OHIO, DEPARTMENT OF EDUCATION, COSTS PER PUPIL, Table 1, at 5, 7–8 and Table 2, at 28, 30–31 (1984–85).

65. The de facto concept presumed that much segregation was not the consequence, or at least the proximate result of, official actions and thus did not implicate equal protection concerns. "[P]urpose or intent to segregate [became] . . . the differentiating factor between *de jure* segregation and so-called *de facto* segregation." Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (emphasis in original). Ascertaining segregative intent when not facial, however, is a "tortuous effort" that may be no more productive than guesswork. *Id.* at 224 (Powell, J., concurring and dissenting). *See also* Palmer v. Thompson, 403 U.S. 217, 219–22 (1971).

66. The Supreme Court has characterized demographic change in the years immediately following a desegregation order as a "quite normal pattern of human migration." Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976). The perception seems consonant with the notion that white flight and persistent segregated housing patterns are the result of deeply embedded social, economic, and demographic forces. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 481–82 (1979) (Powell, J., dissenting).

67. It is analogous to the concept of proximate cause in the sense that liability for the consequences of an act does not extend forever. The problem, however, is identifying a fair and reasonable cut-off point.

than fifteen years of fierce regional resistance to desegregation,[68] and portents of like or even worse reaction if desegregation were forced upon communities elsewhere,[69] the de facto notion afforded a handy if not convincing premise for discounting official actions and policies that have fostered racially separate schools.[70]

Left beyond the purview of equal protection, therefore, were those injuries caused by improper motives that could be hidden or otherwise difficult to discern.[71] Adoption of the de facto concept also represented a decision to limit the ambit of the equal protection guarantee to calculated discrimination and thus exclude the less visible but equally harmful and more pertinent forms of unconscious racial aversion. The notion of de facto segregation largely ignores the centrality of race consciousness and aversion in "our common historical experience, and, therefore, our . . . culture."[72] Because they are assimilated uncritically early in life,[73] attitudes toward race are difficult to unlearn and difficult to acknowledge. Although unconsciously held, their potential for harm is undiminished. Even if consciously aware that it is "wrong" to judge a person on the basis of race, cultural conditioning produces stereotypes that influence decisions and foster separatism. Conditioned expectations that white neighbors will be quieter, cleaner, and more dependable and concerned with property, for instance, engender the conclusion that they will be better neighbors.[74] Given conscious recognition of the legal and moral wrongness of judging persons on the basis of race, it is unlikely that many would acknowledge that racial considerations affected their decision on where to live. Enduring separation suggests otherwise and intimates that race continues to be a powerful, albeit repressed, concern. Although harm is identical whether motive is conscious or unconscious, the de facto concept effectively places constitutionally off-limits those variants of segregation which have become most pervasive and persistent.

The conditioning of the duty to desegregate upon what the Court regards as a satisfactory showing of discriminatory intent[75] prefaced what has become for many school systems virtual constitutional immunity from the equal protection dictates of 1954. Consistent with the de facto principle, the Court concluded that interdistrict remedies would not be required unless state or suburban officials actively and

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68. *See supra* notes 33–42 and accompanying text.

69. Northern opposition to desegregation is long-standing, deep-seated, and has been characterized as hypocritical. *See* 118 CONG. REC. 5455 (1972) (statement of Sen. Ribicoff).

70. School district lines that split racially distinct systems must inevitably be perceived as officially structured dividing lines, and causation-rooted doctrine does little to alter that perception. *See* Milliken v. Bradley, 418 U.S. 717, 804–05 (1974) (Marshall, J., dissenting); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 119 (1970) (if a "child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation"). The setting of constitutional guarantees according to whether a child is "born into a *de facto* society" is thus troublesome. *See* Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142, 148 (5th Cir. 1972) (en banc) (quoting United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 397 (5th Cir.) (Gewin, J., dissenting)), *cert. denied*, 389 U.S. 840 (1967).

71. *See infra* note 155.

72. Lawrence, *supra* note 17, at 330.

73. *See* M. GOODMAN, RACE AWARENESS IN YOUNG CHILDREN 36–60 (1952).

74. *Cf.* Lawrence, *supra* note 17, at 343 (employer guided by cultural stereotypes "perceives white job applicant as more articulate, collegial, thoughtful or charismatic").

75. *Accord* Washington v. Davis, 426 U.S. 229, 238–41 (1976). *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973).

proximately had facilitated segregation.[76] In *Milliken v. Bradley*,[77] the Court not only articulated that limiting principle, but reversed the trial court's finding that the state and nearby communities had contributed purposefully and substantially to the segregation of the Detroit city schools.[78] It thus revoked an interdistrict remedy that was inconsonant with the de facto formulation.[79] Because creation of a new district can bring immunity from desegregation,[80] incentives for purposeful gerrymandering or manipulation of district lines is diminished. Still, a central purpose of the desegregation mandate was to eliminate invidious racial distinctions of formal racial segregation.[81] To the extent residential housing patterns reflect or descend from race-based aversions,[82] such distinctions persist. By disfavoring interdistrict remedies, the Court itself has facilitated their survival.[83]

It followed from the de facto concept, at least as a legalism, that the duty to desegregate abated once a unitary system was found to have been effectuated and official segregation eradicated. The conclusion, that desegregation responsibilities are transient rather than enduring,[84] betokened an additional revision in equal protection terms and tools. The Court's decision in *Pasadena City Board of Education v. Spangler*[85] raised the question whether, as a constitutional matter, desegregation can be effectuated and integration maintained in a meaningful and enduring fashion. Until recently, largely because of the evasion and default of legislators and school administrators,[86] the judiciary shouldered primary responsibility for progress in school desegregation.[87] Consistent with a sense that state-enforced segregation largely has been eliminated, or that additional coercion is self-defeating,[88] responsibility for effectuation of desegregation and maintenance of integrega-

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76. *See* Milliken v. Bradley, 418 U.S. 717, 746–47 (1974). The Court found no right "to attend a unitary school system . . . [u]nless petitioners drew the district lines in a discriminatory fashion, or arranged for white students in the [city] to attend schools in [the suburbs]." *Id.* In so doing, it overturned findings by the district court of intentional segregative action. *See id.* at 725–27, 734–35 n.16, 770–71 (White, J., dissenting).

77. 418 U.S. 717 (1974).

78. *Id.* at 746–47. Both the "District Court and the Court of Appeals found that over a long period of years those in charge of the Michigan public schools engaged in various practices calculated to effect the segregation of the Detroit school system." *Id.* at 762 (White, J., dissenting).

79. *See supra* notes 60–64 and accompanying text.

80. Justice Marshall observed that, by denying a meaningful remedy, the Court afforded "no remedy at all . . . [thus] guaranteeing that Negro children . . . will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past." Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting).

81. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1973); Green v. County School Bd., 391 U.S. 431, 435 (1968).

82. *See supra* text accompanying notes 49–59.

83. "[T]he growing concentration of blacks in central cities, and the almost exclusively white school populations in the suburban rings, means that court orders directed only to the central city will have limited impact." Farley, *supra* note 56, at 192.

84. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436–37 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971).

85. 427 U.S. 424 (1976).

86. *See supra* notes 33–42 and accompanying text.

87. *See supra* notes 6–9 and accompanying text. For a more detailed examination of the Court's assertive desegregation philosophy and strategy, preceding the major limiting principles which emerged in the 1970s, see S. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM BROWN TO ALEXANDER (1977).

88. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 481 (1979) (Powell, J., dissenting) ("[t]he type of state-enforced segregation that *Brown I* properly condemned no longer exists in this country").

tion has been transferred to the governmental bodies that, in the past, proved unresponsive to equal protection demands.[89]

Even if official commitment to segregation is a relic, it would probably be unrealistic, given a representative process, to expect that future policy-making will not favor majority preferences and instincts. The Court may be criticized for disjoining modern segregation from official action,[90] but it is increasingly apparent that constitutional duties to alter such conditions are diminishing, if not vanishing altogether.[91] Absent a response to that new order, racially identifiable schools may be as much a part of the future as they were of the past.

III. DESEGREGATION: A PRELUDE TO RESEGREGATION AND A NEW MAJORITARIANISM

The desegregation mandate originally rested upon the premise that race-consciousness should be displaced by color-blindness.[92] A central irony of new desegregation and integration policies is their race-sensitivity.[93] Although a duty may still exist to eliminate racially identifiable schools that are the product of official discriminatory intent,[94] the Court has become increasingly disinclined to find such ties.[95] Modern school segregation has instead been depicted as the consequence of "familiar segregated housing patterns . . . caused by social, economic, and demographic forces for which no school board is responsible."[96]

If that characterization betrays a notion that residential segregation is constitutionally permissible insofar as it reflects standard behavior, the underlying reasoning

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89. *See supra* notes 33–42 and accompanying text. The transfer of responsibility is consonant with a "now widely accepted view that . . . the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country." Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480 (1979) (Powell, J., dissenting).

90. *See, e.g.*, Abramowitz & Jackson, *Desegregation: Where Do We Go From Here?*, 19 How. L.J. 92, 93 (1975).

91. The duty to desegregate ends when a unitary system is effectuated. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436–37 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971).

92. The objective was to dismantle racially identifiable schools and create unitary schools. *See, e.g.*, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969) (per curiam).

93. Affirmative plans to effectuate desegregation or preserve integration necessitate attention to numbers, quotas, and formulas for effectuating racial balance. *See, e.g.*, Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986); Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574 (2d Cir. 1984). Even magnet school plans may include enrollment limits to ensure racial balance. *See* Kansas City Times, Nov. 13, 1986, at A1, Col. 1, (Metro Edit.).

94. Actually proving discriminatory intent is a difficult assignment. *See infra* notes 131–34, 159–60 and accompanying text. Because "reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable." Personnel Adm'r v. Feeney, 442 U.S. 256, 283 (1979) (Marshall, J., dissenting). Otherwise, routine decisions regarding school sitings and closings, attendance zones, neighborhood policies, faculty hiring, assignment, promotion, transfer policies, curriculum, educational tracks, and social, recreational, and athletic policies, may be subject to scrutiny. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 234–35 (1973) (Powell, J., concurring and dissenting). Still, the inquiry may not be particularly revealing. *See* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 284–85 (1972).

95. The Court's finding that the Columbus and Dayton, Ohio schools were officially segregated represents the exception rather than the rule since the de facto concept was adopted. Its analysis in those cases was criticized sharply as being "remarkably insensitive to the now widely accepted view that a quarter of a century after *Brown* . . . , the federal judiciary should be limiting rather than expanding . . . [its role in] operating the public school systems of our country." Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 479–80 (1979) (Powell, J., dissenting).

96. *Id.* at 480; *see also* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436–37 (1976).

ignores the deeper cause of racially identifiable neighborhoods[97] and accepts racism as a norm. Insofar as it means that a school board should be held harmless for segregation that it did not cause,[98] the characterization merits criticism for being too narrowly focused. Even if bound by the strictures of having to identify official responsibility for racial separateness and inequality, it seems reasonable to expect that the arm of government most able to afford a remedy should be the most responsive. Given the difficulty of reversing residential segregation, albeit acknowledging the distance and alienation resulting from that condition, compounded by the stresses and distractions of inner city life, schools may be the most practical instruments for undoing harm attributable to official action. Limiting their remedial utility to conditions they alone have created, therefore, reflects an arbitrary charting of responsibility reflecting a dissociated perception of official action.

The Court's experience with compulsory desegregation, especially during the 1950s and 1960s, may have contributed to the sense that forceful remedies subverted equal protection objectives. Justice Powell observed that "in city after city [forced integration has fostered] [t]he process of resegregation, stimulated by resentment against judicial coercion."[99] One might more perceptively assert that segregation recurred because the underlying causes of racial aversion were not addressed and unconscious motive thus has a constitutionally unimpaired rein. For many years the Court refused to factor in resentment of or resistance to desegregation as mitigating forces in the crafting of constitutional policy.[100] Even now, courts assert that the Constitution cannot bend to popular will.[101] Yet, it was the Court itself during the 1970s that, while not facially deferring to separatist instincts, afforded them constitutional living space.[102]

Persisting or recurring segregation is an expanding reality with a demonstrated capacity to preclude or reverse equal protection accomplishments. Because education has come to be regarded as something less than a fundamental right,[103] the entrenchment of modern segregation minus even the overt equalization requirement that preceded the desegregation mandate is especially troublesome. To the extent contemporary racial separation is accompanied by increasing social, governmental, and corporate divestment in inner cities and investment in the suburbs, the practical

97. *See supra* notes 54–64, 72–75 and accompanying text.

98. *Id.*

99. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 483 (1979) (Powell, J., dissenting).

100. *See, e.g.*, United States v. Scotland Neck Bd. of Educ., 407 U.S. 484, 492 (1972); Davis v. East Baton Rouge Parrish School Bd., 721 F.2d 1425 (5th Cir. 1983).

101. *See, e.g.*, Riddick v. School Bd. of Norfolk, 627 F. Supp. 814, 822 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

102. By adopting the de facto distinction, sanctifying school district lines, and making the duty to desegregate temporal rather than permanent, the Court identified the means by which separation could be perpetuated consonant with the Constitution.

103. The *Brown* Court recognized education as an important individual and social interest. 347 U.S. 483, 493 (1954). Later, however, it declared that education was not a fundamental right. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 33–37 (1973). Because segregation that is not state-imposed does not evoke strict scrutiny, resegregation might evade even the analysis required by the second half of the separate but equal doctrine. *See id. But see* Plyler v. Doe, 457 U.S. 202 (1982).

consequences may be indistinguishable from those pursuant to the separate but equal doctrine.

If the duty to desegregate has expired or never existed, a central issue is not what school districts must do to satisfy constitutional standards, but whether and how they can be encouraged to promote racial diversity, balance, and equality. Constitutional concerns and duties tied to *Brown* and its progeny are now pertinent only if official policies have been adopted that intentionally facilitate segregation.[104] Because the risk of mandatory desegregation may be minimized by official inaction, a separatist agenda may be promoted by do-nothing inclinations. Plans that mandate racial balance, whether crafted voluntarily or required by the state, nonetheless have emerged and merit serious constitutional attention. Such policies may respond to underlying stereotypes and majoritarian concerns, including those to which the Court in the 1950s and 1960s refused to cater.[105] If so, and especially to the extent such policies raise issues of stigmatization and harm to psyche and educational opportunity no less profound than those confronting the *Brown I* Court, issues of unconscious racism should be addressed.

In the name of integration maintenance, school boards have discontinued or substantially modified busing plans[106] and reintroduced neighborhood school concepts that would have been unacceptable during the mandatory desegregation interval.[107] Contrary to the original objective of eliminating racially identifiable schools, the return to single-race facilities may be a central feature of integration maintenance. Such a reversion may reflect an official sense that controls upon racial mixing are necessary to stem accelerated movement of white students from public schools.[108]

In Brooklyn, New York, for instance, where the white student population had declined from 94.2% in 1957 to 36.4% in 1981, school officials adopted a freedom of choice plan which allowed students from an all-minority high school to attend other high schools in Queens[109] and later anywhere in New York.[110] As white attrition continued, the all-minority school was converted into a receiving institution and became destined for eventual closure.[111] Because white students continued to exit city schools, further destabilizing desegregation efforts, official policy was increas-

104. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436–37 (1976).

105. *See, e.g.*, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam); Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. Prince Edward County Bd. of Educ., 377 U.S. 218 (1964); Goss v. Board of Education, 373 U.S. 683 (1963); McNeese v. Board of Education 373 U.S. 668 (1963); Cooper v. Aaron, 358 U.S. 1 (1958).

106. *See* Riddick v. School Bd. of Norfolk, 784 F.2d 521, 525 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

107. *Id.* In 1968 the Court invalidated a freedom of choice plan that essentially perpetuated neighborhood schools. *See* Green v. County School Bd., 391 U.S. 430, 441–42 (1968). It did not hold that such a plan would never be acceptable but concluded that a system, when required to desegregate, must use the speediest and most effective means. *Id.* at 439–40. Schools that have desegregated, therefore, can refer to the Court's harder-line cases in justifying a return to neighborhood school concepts.

108. Concern over accelerated movement of whites from the Norfolk schools was cited as a reason for adopting a plan that would make one-third of the city's elementary schools more than 70% black. *See* Riddick v. School Bd. of Norfolk, 784 F.2d 521, 527 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

109. *See* Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 710 (2d Cir. 1979).

110. *Id.* at 711.

111. A "receiving school" is one that has an admissions policy transcending attendance zones. *Id.* at 711–12.

ingly directed toward addressing white sensitivities. The pursuit of racial balance thus became governed by concern that, if minority enrollment in certain receiving schools was perceived by whites as proceeding too rapidly, they would leave at a faster rate.[112]

By imposing controls upon the rate and extent of racial change at receiving schools, the plan contemplated a transfer of minority students that would be sufficiently gradual to avoid fostering district-wide resegregation.[113] Inherent in such constraints upon entry into racially diverse schools were limitations upon exit from racially identifiable schools.[114] The plan's viability, therefore, was tied directly to perpetuation of single-race schools and a system of racial preferences. Unlike traditional affirmative action schemes, however, the burden fell not upon members of the majority but upon the victims of past discrimination who were denied transfers to mixed schools.[115]

Another system of racially identifiable schools characterizes an integration maintenance plan adopted by Norfolk city officials and challenged in *Riddick*.[116] Unlike New York, where school integration had voluntarily been adopted as state policy, Norfolk schools had been desegregated by court order in 1971— fifteen years after litigation was commenced.[117] Four years later, the school system was declared unitary[118] and resegregation, unless found to be the product of official discrimination, became constitutionally permissible.

Like other cities forced to desegregate, Norfolk experienced a general loss of population[119] and decline in white enrollments highly disproportionate to that in black enrollments.[120] Claiming that its purpose was to minimize white flight, the school board reintroduced neighborhood schools for elementary students[121] who, assuming the plan worked, would be fed into racially mixed junior and senior high schools.[122] The trial court noted that public sentiment could not obstruct or dilute the obligation to dismantle an officially segregated dual school system.[123] Nonetheless, it concluded that white flight might be factored into voluntary efforts to improve racial balance.[124]

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112. A "Controlled Rate of Change Plan" was introduced to balance integration objectives "against the perceived reality that if the minority enrollment in an individual receiving school increased too rapidly or reached a critical absolute level (the so-called 'tipping point'), white students would leave the receiving school at an increasing rate." Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 573, 576 (1984).

113. *Id.*

114. Black and Hispanic student thus could not enroll in schools where their attendance would decrease the white to minority balance by four percent in a year or make white enrollment dip below a 50% tipping point. *Id.* at 577.

115. Because white enrollments in the system were low, "one group of minority students [could] be kept in stable integrated schools only at the cost of requiring another group of minority students to remain in largely or exclusively all-minority schools." *Id.* at 581 n.9 (*citing* Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 717–19 (2d Cir. 1979)).

116. Riddick v. School Bd. of Norfolk, 627 F. Supp. 814 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). *See also supra* text accompanying notes 31–33.

117. *Id.* at 816–17.

118. *Id.* at 818–19.

119. Norfolk's population in 1970 was 307,951 and in 1980 was 266,979. *Id.* at 817.

120. White enrollments from 1970 to 1983 decreased from 32,586 to 13,327, while black enrollments decreased from 24,244 to 20,681. *Id.*

121. The creation of single attendance zone schools was accompanied by a majority-minority transfer option so that a student "did not have to attend a school in which his race constitutes more than 70% of the student body." *Id.* at 818.

122. *Id.* at 818.

123. *Id.* at 823.

124. *Id.* at 824.

Unless and until the Court finds otherwise, the *Riddick* decision provides authority for allowing school officials to curtail busing and reintroduce neighborhood schools[125] and is relevant to a multitude of communities.[126] Like the Brooklyn plan, Norfolk's policy was crafted in response to white flight and its perceived destabilizing effect upon a mixed school system.[127] Concern for majoritarian preferences, which was earlier found unacceptable as a basis for evading desegregation,[128] for now may be alluded to as a predicate for integration maintenance.

Freedom of choice plans adopted immediately after *Brown* were found unconstitutional because they did not actually result in the dismantling of dual school systems.[129] If racially identifiable neighborhood schools become the norm after a desegregation interval, however, *Brown* may have merely suspended rather than eliminated the old order. Determination of future unconstitutionality, absent a doctrinal change, will be a much more treacherous process than in the past.[130] Discriminatory purpose and thus denial of equal protection were manifest when segregation was calculated.[131] To the extent official action is not overtly discriminatory, unconstitutional purpose becomes elusive.[132] In the 1960s, the Court could conclude that a desegregation plan's failure to work "after three years of operation" sufficiently demonstrated that it was a ruse.[133] Integration maintenance plans cannot be evaluated so readily. To the extent they are predicated upon gradual change and rely upon concepts such as feeder systems,[134] their efficacy must be assessed from a longitudinal perspective.

Contemporary equal protection dogma includes the notion that, if court-ordered desegregation has been complied with in good faith, "it's time to restore to local authorities full responsibility for running their public schools."[135] Modern schooling, however, is not far removed in time from official discrimination, nor is de facto segregation as detached from official action as the Court might wish. As persisting or recurring separation suggests, the prohibition of official segregation did not alter as much as it repressed the forces of racial aversion.

Race-conscious policies may be offered with the justification that limited segregation is preferable to total segregation. To the extent racial preferences are central to desegregation effectuation and integration maintenance, vexing constitu-

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125. The Norfolk case is considered significant because it could "prompt an end to busing in as many as 150 school districts." *Busing: The Next Phase*, Newsweek, Nov. 17, 1986, at 60, col. 1.

126. *See id.*

127. Riddick v. School Bd. of Norfolk, 627 F. Supp. 814, 816 (E.D. Va. 1984), *aff'd*, 784 F.2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

128. *See* United States v. Scotland Neck Bd. of Educ., 407 U.S. 484, 491 (1972).

129. *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. Prince Edward County Bd. of Educ., 377 U.S. 218 (1964); Goss v. Board of Education, 373 U.S. 683 (1963).

130. To the extent segregation is not facially mandated, identification of constitutionally impermissible intent is a "tortuous effort." Keyes v. School Dist. No. 1, 413 U.S. 189, 224 (1973) (Powell, J., concurring and dissenting).

131. *See supra* note 52.

132. *Id.*

133. Riddick v. School Bd. of Norfolk, 784 F.2d 521, 532 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

134. *See supra* notes 112–13, 122, and accompanying text

135. *See, e.g.*, Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983). *See generally* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480–89 (1979) (Powell, J., dissenting).

tional concerns must be addressed.[136] A reciprocal of racial preference may be racial aversion. Insofar as the New York and Norfolk policies respond to the former, they may respond to the latter. If stigmatization or harm to psyche or educational opportunity is an enduring equal protection concern, such craftings ultimately must be measured accordingly.

IV. Desegregation Effectuation and Integration Maintenance in the 1980s and Beyond

The revised lesson of 1954, as the Court has instructed,[137] is that the Constitution does not countenance state-enforced segregation. Two companion discoveries are (1) the desegregation mandate has not resulted in pervasive or enduring desegregation, and (2) equal protection must be pursued "in a world in which human conduct, often self-seeking and sometimes sordid, as well as the realities of nature, limits our options."[138]

Judicial intervention in the educational process, to secure equal protection interests, has been a constant source of resentment. The Court has been criticized for displacing the judgment of elected officials and professional educators and interfering with the authority and discretion of parents who, losing confidence in public schools, will send their children elsewhere.[139] Popular notions have emerged that an active judicial role in promoting equal protection objectives actually sacrifices them.[140] Given emerging majoritarian-sensitive policies that are overtly and consciously tied to race, however, exacting review cannot be bypassed absent an abdication of responsibility to assess the constitutionality or the vitiation of the dictates and spirit of *Brown*.

A. *New Dimensions and Problems in Affirmative Action*

When school officials assign students to neighborhood schools as part of a race-conscious plan[141] or set rate and extent of change constraints,[142] they use racial preferences or quotas. The Court has approved such concepts insofar as they are necessary to eliminate vestiges of state imposed segregation.[143] Mandatory busing, for instance, was endorsed as an essential methodology for effectuating racial balance and thus unitary schools.[144] To the extent that preferences and quotas are employed in a voluntary plan, however, they raise more complex affirmative action issues.[145]

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136. Controls upon the number and rate of minority transfers, such as those in Brooklyn, constitute a scheme of racial quotas or preferences.

137. *See supra* notes 54–91 and accompanying text.

138. Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 581, 718 (2d Cir. 1979).

139. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 484 (1979) (Powell, J., dissenting).

140. *Id.* at 483–84.

141. *See supra* note 121 and accompanying text.

142. *See supra* notes 112–13 and accompanying text.

143. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362–63 (1978) (citing decisions approving race-based remedies to remedy effects of past discrimination).

144. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–30 (1971).

145. *See infra* notes 146–55 and accompanying text.

The concept of using race-conscious remedies to redress injury from past discrimination is not novel, but it raises special concerns when part of a majoritarian-sensitive integration plan. Limiting mechanisms tied to promoting equal protection values are different from those that overtly breach them. Preferences or controls nonetheless evoke disquieting concern regarding whether they actually are "benign."[146] Their operation has engendered general concern to the extent they might impose burdens upon individuals to advance a group's general interest.[147] Restrictions on minority transfers to mixed schools[148] feed that worry. Insofar as they limit opportunity, and in so doing accede to senses of racial aversion, the underlying thinking is worrisome and even reminiscent of that associated with the separate but equal doctrine.[149] If a "measure of inequity . . . [exists] in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making,"[150] a seemingly greater inequity exists when the innocent person belongs to the victimized group. Considering the recency of overt discrimination and persistence of segregation as the result of subtle or unconscious mental processes, concern that preferences might subvert equal protection objectives is probably reasonable.[151]

Given modern curbs upon the desegregation formula, preferences or quotas may seem especially alluring if presented as a mechanism essential for ensuring partial integration and preventing complete segregation.[152] Although such methodologies have evoked criticism for "stand[ing] integration on its head,"[153] the vitality of the de facto concept and unavailability of interdistrict remedies lend practical support to claims that policies selectively burdening minorities may be essential for maximizing integration and ensuring "[t]he greatest good for the greatest number of people."[154] Even if offered as a means for promoting integration, official policy may stigmatize, injure psychological well-being, and impair educational opportunity. Plans formulated in response to majoritarian aversions essentially validate those disinclinations.

The Court itself has expressed general concern that racial preference schemes may actually burden individuals in the group whose interests purportedly are to be advanced.[155] The operation of majoritarian-sensitive integration policies heightens

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146. The term "benign" is used to describe a classification intended to promote rather than burden equal protection interests.

147. *See supra* notes 102–13 and accompanying text.

148. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978).

149. The Court's conclusion that states could mandate separate but equal facilities in part reflected worries concerning "the preservation of the public peace and good order." Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

150. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978).

151. *Id.* at 298, 331–32 (Brennan, J., dissenting).

152. Such claims have been presented to the Supreme Court. *See supra* notes 119–27 and accompanying text. Norfolk school officials maintained that, without their controverted integration maintenance plan, "the system would be 75% black by 1987." Riddick v. School Bd. of Norfolk, 784 F.2d 521, 526 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986). A total exodus of white students, and continuing unavailability of interdistrict remedies, may make desegregation effectuation and integration maintenance impossible absent voluntary solutions or incentives. *See* Farley, *supra* note 56, at 192.

153. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 604 (1985).

154. Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 719 (1979). *See* Riddick v. School Bd. of Norfolk, 784 F.2d 521, 543 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

155. Worries that racial preferences reinforce stereotyping and are demeaning, for instance, would seem less operative. *See* Fullilove v. Klutznick, 448 U.S. 448, 531–32 (1980) (Stewart, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298, & 360 (1978). Concern that preferences may reinforce stereotypes, by intimating that

that risk. Insofar as official action defers to racial aversion, minorities are not only burdened but are effectively made responsible for wrongs committed against them. Resorting to concepts that place upon victims of discrimination a heavy burden for rectifying wrongdoing may be an inevitable consequence of a squelched desegregation mandate. Such an allocation, moreover, seems to have been neither foreign nor fatal even to the original desegregation concept. Generational sacrifice, for instance, was contemplated and countenanced by the desegregation strategy itself. Because protracted litigation was foreseeable, it was understood that plaintiffs and their contemporaries would not reap the educational fruits of their efforts.[156] For them, equal protection delayed was equal protection denied. Given much less rigorous equal protection demands by the Court now than in the past, it may be unrealistic to expect minimal burdens upon the purported beneficiaries of new policies.

Concern that victims of segregation may be unconscionably burdened by majoritarian-sensitive practices, however, is probably well-founded. Plans that cater to majoritarian preferences may service majoritarian interests which, during the equal protection guarantee's history, have largely consisted of preserving racial separation and distance. To the extent desegregation principles have been declared self-defeating, equal protection concepts have failed both before and since 1954. As noted before, acceptable modern segregation and intolerable past segregation are merely variant consequences of the cultural conditioning that induces racial aversion. The *Brown* Court recognized past doctrinal failures, and revised equal protection thinking accordingly. Precedent, not to mention need, thus exists for additional reworking pursuant to recognition of *present* doctrinal failures. Pursuit of equal protection objectives in a post-desegregation context may require accommodation of competing majority and minority interests. The negation of racial aversion as a barrier to effectuation of equal protection guarantees, however, may necessitate not merely affixing convenient labels to variants of segregation but confronting their common cause.

B. *Escaping the Discriminatory Intent Trap*

A prerequisite to elevated review, in an equal protection context, is proof of discriminatory intent.[157] Policies, especially to the extent that they are crafted by officials who are elected by a majority and thus are likely to be responsive to majoritarian sentiments, may prove inconsonant with announced equal protection objectives. Heightened scrutiny, which has attracted criticism in other affirmative action contexts,[158] might theoretically protect legitimate equal protection interests

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beneficiaries would be unable to succeed on merit, is an especially unconvincing rationale in any context. To the extent success of white males can be tied generically to better connections and reduced competition from females and minorities, a demeaning stereotype emerges that may be dependent upon affirmative action for its eradication. Nor would minorities be afforded special status at the expense of the majority. The absence of any special privilege would help offset or dilute concerns not only with respect to unwanted stereotypes but to burdens imposed upon purportedly innocent persons.

156. *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 862 (5th Cir. 1966), *corrected*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967); Abramowitz & Jackson, *supra* note 90, at 92–93.

157. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

158. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986) (equal protection denied by collective

when official policy reflects or facilitates majoritarian aversions. So far, however, it has failed to operate as a barrier to emerging majoritarian sensitive plans.

The Court has suggested several criteria for determining whether an impermissible intent exists. However, most of them are patently inadequate. Consideration of racially discriminatory impact, history, specific prior events, departures from usual procedures, and contemporaneous statements of decision-makers[159] has not been especially helpful in ferreting out discriminatory intent in any circumstance. Discriminatory purpose can too easily be disguised or obscured.[160] History and past events are largely irrelevant to the extent that many suburban communities have no discrete past to focus upon or modern segregation is regarded as a "normal pattern" rather than symptomatic of a more profound cultural force. Consonant with such perceptions, modern race-conscious pupil assignments have been regarded as the consequence of residence rather than racial classification.[161]

Given a binding intent requirement, pragmatic incentives exist to continue attempting to demonstrate the linkage between diverse forms of government action and modern segregation. If this connection were finally acknowledged, architects of new policies would at least be expected to demonstrate that their policies are workable and free from discriminatory purpose.

Whether policies that defer to majority preferences can work practically and constitutionally in the long run is at best debatable. To the extent that approval of them endorses racial aversion, it may reinforce racist patterns within the culture. The same harms found unacceptable when attributed to the separate but equal doctrine thus may be countenanced.

The very existence of a discriminatory intent prerequisite, as noted earlier, has evoked extensive criticism. Debate has largely been framed as a choice between a discriminatory motive and a discriminatory effect standard.[162] Examination of majoritarian-sensitive, race-conscious policies not only affords an opportunity to reconsider whether those choices are the only ones available, it also invites appraisal of whether either is relevant for assessing modern variants of segregation. Insofar as those strains are primarily the product of unconscious rather than conscious inclination, a strong argument exists that the intent requirement is obsolete. A major obstacle to its abandonment, however, is fear that the alternative, a discriminatory impact requirement, would disrupt the legislative process by risking the validity of a "whole range of [existing] tax, welfare, public service, regulatory and licensing statutes."[163]

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bargaining agreement providing preferences for minorites in the event of lay-offs). To the extent that racial preferences are legislated or collectively bargained for, and majority interest thus adequately represented, a compelling argument exists for judical review that is less exacting than if the burden falls upon groups traditionally excluded from or underrepresented in the political process. *See* Harris v. McRae, 448 U.S. 297, 341–42 (1980) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 109–10 (1973) (Marshall, J., dissenting).

159. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 257, 266–68 (1977).

160. *See* Lawrence, *supra* note 55, at 319. *See also supra* note 94.

161. *See* Riddick v. School Bd. of Norfolk, 784 F.2d 521, 540 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986).

162. *See, e.g.*, *Colloquium on Legislative and Administrative Motivation in Constitutional Law*, 15 SAN DIEGO L. REV. 925 (1978).

163. Washington v. Davis, 426 U.S. 229, 249 n.14 (1976).

By choosing another mode of analysis altogether, and focusing upon the cultural meaning of an official action,[164] the Court might abandon one badly flawed standard without having to embrace another. Such a test would not be alien to constitutional analysis.[165] It will be difficult for a court to determine whether a culture attaches racial significance to a policy, but certainly no more difficult than determining discriminatory intent. Although formal segregation would be strictly scrutinized pursuant to either test, the cultural significance of acts contributing to residential segregation might have strengthened the case for heightened rather than deferential review of the school desegregation cases of the 1970s. Insofar as modern policies cater to majoritarian concerns and aversions regarding race, exacting review would follow and government would have to present a compelling justification. Because a discriminatory intent standard has led to insurmountable barriers against equal protection relief, and does not even measure unconscious motivation, a new test for calibrating the appropriate level of judicial review may be indispensable for security against modern wrongs.

C. *Moving Ahead Toward Equal Educational Opportunity and Non-Stigmatizing Policies: Short-Term and Long-Term Agendas*

It should not be surprising that a society, which so recently accepted official segregation and even now regards white flight immediately following a desegregation order as a "normal pattern of human migration," remains strongly influenced by racial consciousness. Nor should it be surprising that, despite prohibition of official segregation, underlying racial aversion that remains culturally engrained has provided a predicate for constitutionally resistant forms of modern segregation. Still, upon a pragmatic reading of recent court decisions, one cannot escape the reality that, for now, remedial options are limited. Contemporary facilitation of equal protection interests may require working within the constraints upon the desegregation mandate. Such a focus need not be inconsonant with seeking a fundamental overhaul of equal protection thinking.[166] However, major restructuring probably must be consigned to a longer-term agenda.

Heightened review of post-desegregation policies may be especially necessary in the short-term to prevent a doctrinal slide past separate but equal to separate period. The *Brown* Court, in abandoning the separate but equal doctrine, not only insisted upon the elimination of dual school systems but upon "the best possible educational opportunity for all children."[167] Because the desegregation mandate was embraced with the expectation that equal protection values could be pursued more effectively, modern constitutional standards should not countenance any reversion to pre-1954 ways or conditions. Although full equalization prior to *Brown* was never insisted

164. The utility and sensibility of a cultural meaning test is examined in Lawrence, *supra* note 55.

165. The significance which a culture attaches to an act or policy, for instance, is central to determining the contours of liberty protected by the fourteenth amendment, the ambit of constitutionally protected expression, and a reasonable expectation of privacy and cruel and unusual punishment.

166. The assault upon the separate but equal doctrine attempted both to effectuate immediate equalization and to educate the Court over an extended period of time regarding its constitutionally fatal flaws. *See* K. RIPPLE, *supra* note 48, at §§ 4.2–4.3; Marshall, *supra* note 48, at 318.

167. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973).

upon generally, it is difficult to justify any modern standard that would demand less than what might have been maximally achieved pursuant to the separate but equal doctrine.

Equalization devices might include magnet schools or other enrichment programs that may also be helpful in effectuating desegregation or preserving integration.[168] Heavy investment in the magnet school concept, for instance, might afford incentives that offset or outweigh racial aversion that would otherwise be present. Consistent with that notion, one court has ordered allocation of $196 million to transform each of Kansas City's high and middle schools and half of its elementary schools into magnets—each with a unique curricular theme,[169] to encourage shopping on the basis of interest rather than residence.[170] Such a program allows parents to choose where their children will attend school, but does so in terms tailored to facilitate integration and ensure equalization.

Another option, catering more to majoritarian sentiments, would be for city students to attend suburban schools at state expense. Such a plan would attempt to minimize educational limitations imposed by residence, the harsh consequences of the de facto concept, and the sanctifying of district lines.[171] Although parents would have a right to select schools by choosing residence, it would not translate into the power to exclude those whose educational opportunity was limited by their location.[172] Such a plan invites attack for siphoning off talented students from poor districts, transforming urban schools into vocational training centers, and catering to racist attitudes.[173] It is especially vulnerable to criticism that the policy is built upon the assumption that most black urban schools are unfit for white students, and thereby perpetuates racial stereotypes and stigma. Some pragmatists, however, may find such options useful as a means of accommodating parents' constitutionally protected interest in how their children will be educated.[174]

Neither desegregation nor integration by itself is necessarily an equal protection elixir.[175] It would be a mistake to conclude, however, that their respective

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168. A high school, for instance, might be the beneficiary of enriched academic and vocational programs despite abandonment of hope for its integration. *See* Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574, 576 (2d Cir. 1984); Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 712 (2d Cir. 1979).

169. *See It's Full Steam Ahead for Magnet Schools,* Kansas City Times, Nov. 13, 1986, at A1, col. 1 (Metro Ed.). Individual schools will offer separate curricular themes including computers, communications and writing, environmental sciences, foreign languages, classical Greek, science and math, visual and performing arts, Montessori, Latin, engineering and technology, law and public service, ROTC, business technology, agribusiness, international studies, and health professions. *Id.* at All.

170. *Id.*

171. *See supra* notes 54–83 and accompanying text.

172. Deference to residential housing patterns thus would not necessarily subvert equal protection values in the area of education.

173. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480 (1979) (Powell, J., dissenting); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434–36 (1976); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 132–33 & n.47 (1970).

174. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Modern inclinations to accommodate that parental liberty interest reflect a sense that school enrollment is a joint product of official and parental judgment. *See* Coleman, *New Incentives for Desegregation,* 7 HUMAN RIGHTS 10, 13 (No. 3, 1978).

175. Negative expectations for minority students in a mixed setting are commonplace. Pursuant to enduring stereotypes, minority students experience more disciplinary measures. "At the high school level, blacks are suspended three times as often as whites." Christian Science Monitor, Nov. 20, 1986, at 29–30, col. 1. Critics attritube the disparity

effectuation and maintenance are no longer relevant to equal protection. Voluntarily adopted programs intended to promote racial balance, without burdening any racial group, should also be welcome. For instance, magnet school plans, designed to offset the significance of residence, may be willingly embraced and not just court-ordered.

Government-supported financial incentives may also be structured to influence residential patterns directly. Interest rate subsidies, mortgage supplements, or subsidies and down-payment loans, for instance, might help steer persons into neighborhoods in a fashion that helped redress past government-influenced steering.[176] Even if residential patterns cannot be revised radically, the fostering of racially mixed schools might be augmented by additional incentives such as college tuition credits for attendance at certain schools.[177] The problem in using incentives is less the conceiving of ideas than it is a commitment of resources for implementing them.

The absence of minimal equalization principles or failure to pursue even the limited options for desegregation or integration could not help but ensure that most minority and especially "urban . . . children [would] be locked in . . . schools . . . which are as separate and unequal today as they were before 1954."[178] Insofar as separate schools afford the same unequal education as they did in the past,[179] and do not even claim to be equal, the prospect exists for reversion to and acceptance of conditions associated with the earliest years of the separate but equal doctrine's operation.[180] The Court invalidated the separate but equal doctrine because it was clearly erroneous. It would be tragic if equal protection guaranteed less today than it did prior to 1954.

Whether implementation of magnet school concepts or other remedies presently available will afford more than a superficial equal protection response in the long run is dubious. So long as culturally induced racial aversion remains beyond the reach of equal protection, methodologies for maintaining separation probably will continue to surface. Modern racial aversion, when placed in a historical context, descends directly from efforts to maintain white supremacy and separateness, first through slavery and later through black codes and the separate but equal doctrine.[181] The enduring majoritarian inclination toward separation was given impetus by principles

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to "a self-fulfilling expectation on the part of many teachers and administrators that black children from ghetto environments will cause discipline problems." *Id.* In more blunt terms, it has been blamed on "white institutional racism." Hawkins v. Coleman, 376 F. Supp. 1330, 1336 (N.D. Tex. 1974). Negative expectations and stereotypes also help explain why minority students have a higher drop-out rate and may be undereducated or effectively programmed for failure. *See* Christian Science Monitor, Nov. 20, 1986, at 29, col. 1.

176. Ohio, for instance, has earmarked part of a mortgage revenue bond issue for first-time black home buyers moving into predominantly white neighborhoods and their white counterparts moving into areas that are less than 60% white. *See America Moved to the Suburbs, and So Did the Integration Battle*, The Washington Post National Weekly Edit., July 14, 1986, at 34, cols. 1–2.

177. *See* Coleman, *supra* note 164, at 49.

178. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 490, 515–16 (1976).

179. *See* Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting).

180. The first test of the separate but equal doctrine in the area of education resulted in the affirmation of a school board's decision to close a black high school and thus deny black students an education, even though white students continued to attend school. *See* Cumming v. Board of Education, 175 U.S. 528 (1899).

181. *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–25 (1960).

framed during the 1970s that curtailed the desegregation doctrine. Given that backdrop, the drift toward majoritarian-sensitive policies in the name of desegregation effectuation or integration maintenance properly evokes concern that it may lead toward endorsement of separatist instincts and cause additional stigmatization and harm. If it does, the only value attributable to such concepts will depend upon whether they are part of a necessary dialectic preceding an ultimate doctrine capable of responding to modern racism and segregation.

V. CONCLUSION

For most of its history, equal protection has deferred to majority concerns regarding matters of race rather than safeguarding minority interests. From 1896 to 1954, majoritarian favoritism was patent. The desegregation interval, at least until the 1970s, represented a discrete phase during which the Court assertively sought to secure constitutional rights for those traditionally excluded from, underrepresented in, and oppressed by the political process and stigmatized by virtue of race. Since then, the grounds for establishing a constitutional violation have narrowed substantially, as have the prospects for meaningful relief even if equal protection has been denied. Although it may be possible to ameliorate conditions within that framework, lasting change may be unattainable. Absent an eventual willingness to restructure the desegregation formula so that it reaches the underlying and enduring causes of racial aversion, equal protection guarantees will probably remain subordinated to equal protection legalisms.